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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 653

EMMOGENE SNYDER PRESCOTT,
Petitioner,

vs.

SHELL OIL COMPANY, INC.,
Respondent.

## PETITION FOR WRIT OF CERTIORARI
**To the United States Court of Appeals for the Sixth Circuit.**

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**To the United States Court of Appeals for the Sixth Circuit.**

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Emmogene Snyder Prescott, prays that a writ of certiorari issue to review the judgment and decision of the United States District Court for the Western District of Tennessee, Western Division, rendered in this cause by the official opinion filed on March 23, 1967 (App. pp. 27-30). Said judgment was based on the oral ruling of February 3, 1967, by the Honorable Robert M. McRae, Jr.,

which was reduced to writing (App. pp. 25, 26). The final judgment was filed in the United States District Court on April 4, 1967 (App. pp. 29, 30). Said judgment was affirmed by the United States Court of Appeals for the Sixth Circuit on July 23, 1968 (App. pp. 32-37), and Judgment entered thereon.

Your petitioner prays that this Court review and reverse the judgment and decisions mentioned herein above.

## JURISDICTION.

The final judgment in this cause was entered in the United States District Court for the Western District of Tennessee, Western Division on April 4, 1967 (App. pp. 29, 30), and affirmed by the judgment of United States District Court of Appeals, Sixth Circuit, on July 23, 1968 (App. pp. 32-37).

The jurisdiction of this Court is invoked under Rule 19 (b) of the Rules of the Supreme Court of the United States on the grounds that the decision rendered in this cause (Shell Oil Co., Inc. v. Prescott) is in conflict with the decision of another court of appeals on the same matter. The other decision referred to being Shell Oil Company, Inc. v. Blumberg et al., 154 Federal Reporter 2d 251, decided by the U. S. Circuit Court of Appeals for the Fifth Circuit on March 22, 1946.

Petitioner, Emmogene Snyder Prescott, contends that the facts in her case are the same or very similar to that of the Shell Oil Co., Inc. v. Blumberg case in the following particulars:

1. Both cases involved the interpretation of dual options in a lease contract, that is, a fixed price option and a first refusal option.

2. Both cases involved the first refusal option being exercised first by the lessor putting the lessee on

notice of the proposed purchase of the leased premises by a third party.

3. In both cases, the Shell Oil Co., Inc., attempted to exercise their rights under the fixed price option after being duly notified of the proposed purchase under the first refusal option of the lease agreement.

In the Shell Oil Co., Inc., v. Blumberg case the U. S. District Court of Appeals for the Fifth Circuit affirmed the decision of a lower court and refused to grant specific performance under the provisions of the fixed price option.

In the case at hand, Shell Oil Co., Inc. v. Prescott, the same facts were present as in the Shell Oil Co., Inc. v. Blumberg case but the United States District Court of Appeals for the Sixth Circuit affirmed the decision of the lower court and granted specific performance under the fixed price option.

## THE QUESTION PRESENTED.

### First and Only Question.

Can Lessor, under a dual option lease contract be required to sell to lessee certain property containing a service station at the fixed price option of $32,500.00 where lessor has, prior to the exercise of said fixed price option, received and notified lessee of a bona fide offer of purchase for $50,000.00 from third party, pursuant to provisions of first refusal option in contract.

The District Court and the United States District Court of Appeals answered this question "yes."

Your petitioner Emmogene Snyder Prescott, contends that the answer is "no."

## STATEMENT OF THE CASE.

This case was heard on the pleading and stipulations filed in the cause and all the material facts were stipulated and admitted.

The appellant, Emmogene Snyder Prescott, was the lessor in a written lease agreement with the appellee, Shell Oil Co., Inc. Said lease agreement was prepared on a Shell Oil Company printed form of lease and terminated on April 14, 1966. Said lease contained two paragraphs which are the subject of this suit, to-wit:

> "Thirteenth. At any time during the term of this lease or any extension or renewal, Shell shall have the option to purchase the leased premises, with all appurtenances, improvements and equipment and Lessor's fixtures and personal property thereon, for the sum of Thirty Two Thousand Five Hundred Dollars ($32,500.00) exercisable by notice to Lessor".
>
> "Fourteenth. If at any time during the term of this lease, or any extension or renewal thereof, Lessor receives from a ready, willing and able purchaser a bona fide offer to purchase the leased premises, which Lessor desires to accept, Lessor shall give Shell notice, setting forth the name and address of the prospective purchaser and the price and terms of the proposed sale, accompanied by Lessor's affidavit that such prospective sale is in good faith. Shell shall thereupon, in addition and without prejudice to Shell's rights under Article Thirteenth, have the prior option to purchase said premises and Lessor's improvements, fixtures and personal property thereon from Lessor at said price and terms. If Shell elects to exercise said option, it shall so notify Lessor within twenty-five days after Shell's receipt of the aforesaid

notice of Lessor's desire to sell. Shell's right to purchase under this Article shall be a continuing right during this lease, or any extension or renewal, whenever Lessor, or any successor in title, desires to sell said property. Shell's failure to exercise any option under this Article shall in no way affect this lease, Shell's rights under Article Thirteenth, or its right to the estate herein created".

During the term of the lease, the following events took place:

(1) On March 18, 1966, pursuant to paragraph 14 of the lease, petitioner, Emmogene Prescott wrote the Shell Oil Company, Inc. notifying them that she had a bona fide offer from others to purchase the property for Fifty Thousand Dollars ($50,000.00) and gave Shell Oil Company, Inc., the right of first refusal to purchase at this price.

(2) On April 4, 1966, Shell Oil Company, Inc., wrote to Mrs. Prescott, notifying her that they did not choose to exercise its option under Paragraph 14, but that it did elect to exercise its option under Paragraph 13 to purchase said property at the fixed price option of Thirty Two Thousand Five Hundred Dollars ($32,500.00).

(3) Mrs. Prescott refused to acknowledge Shell Oil Company's right to purchase under Paragraph 13 and Shell Oil Company, Inc. brought this suit for specific performance.

The Shell Oil Company, Inc. filed a motion for a judgment on the pleadings and Emmogene Snyder Prescott, filed a motion for summary judgment.

On February 3, 1967, the District Court, by oral opinion (App. pp. 25, 26) ruled in favor of Shell Oil Company, Inc., holding that they were entitled to specific performance under the lease requiring Mrs.

Emmogene Snyder Prescott to convey the property to them for Thirty Two Thousand Five Hundred Dollars ($32,500.00).

On March 23, 1967, the District Court filed an opinion regarding supplemental relief to the appellee, Shell Oil Company, Inc. (App. pp. 27, 28).

On April 3, 1967, the District Court entered the final judgment in the cause (App. pp. 29, 30).

On April 5, 1967, appellant, Mrs. Emmogene Snyder Prescott, filed notice of appeal (App. p. 31).

The basis for federal jurisdiction in this case was because the amount in controversy exceeded $10,000.00 and Shell Oil Company, Inc. was a non-resident of the State of Tennessee, being a Delaware Corporation.

## ARGUMENT.

The answer to the question involved in this cause necessarily involves the interpretation of paragraphs 13 and 14 of the lease agreement which contains the dual option provisions in the contract.

There appears to be no reported cases in Tennessee that are in point, but Vol. 8, A. L. R. 2d, contains a summary of the cases dealing with the incorporation in one instrument of two purchase options relative to the same property. This subject is covered also by Corbin on Contracts (1950), Sec. 261, p. 864, which states as follows:

> "A party may be given an option to buy (or to sell) at a stated price and at the same time a right that there shall be no sale at any price without first being given an option to buy (or to sell) at the price offered by a third person.
>
> "There is no inconsistency between these two provisions; they merely create a power to consummate one contract (the option) and a right that no other contract shall be made without first giving another option on the new terms. Indeed, the second of these is normally to be implied in the first, during the specified option period. The inclusion of the second in express terms may be intended by the parties to create in the option-giver a power to terminate the option at any time before its exercise by making a new offer to the option holder on the terms offered by a third party. If such is the reasonable interpretation, the parties have created (1) an Option to Buy (or sell) at one price; (2) a Right of First Refusal at a second price yet to be determined; and (3) a Power of Termination of the option by actually giving the Refusal."

While there are no reported cases in Tennessee dealing with the dual option question it has long been the rule in

Tennessee that "The right to specific performance in particular case is governed by the ordinary principles of equity, 'Equity, in decreeing specific performance, requires not only that the contract be just and equitable in its provisions, but that the consequences of specific performance likewise be equitable and just. One of the general rules formulated and followed is that this equitable relief will not be granted if, under the circumstances of the case, the result of the specific enforcement of the contract would be harsh, inequitable, oppressive, or result in an unconscionable advantage to the plaintiff, even though the complainant has no intention of taking an unfair advantage, and even though the contract may be valid and enforceable at Law. In every case where a specific performance is asked, the question must be whether the exercise of the power of the court is demanded to subserve the ends of justice, and unless the court is satisfied that it is right in every respect, it will refuse to interfere.' 49 Am. Jur., Section 58, page 72; Moss Tie Co. v. Hill, 191 Tenn. 582; Ring v. Jehl (Tenn. 1967), 421 S. W. 2d 375."

Before the turn of the century, on May 9, 1889, the Supreme Court of Illinois, in the case of Harding v. Gibbs, 125 Illinois 85, decided this question by holding in favor of the lessor and had the following comment to make in reversing the lower court:

> "The parties to a lease endorsed upon it an agreement that the lessee should have the privilege of purchasing the premises during the first year, on certain terms therein stated; but that if the lessor should have an offer for the property, 10 days' notice thereof should be given to the lessee, who should have the privilege of selling. Within the year the lessor sold the property, and after the deed was given notice of the offer signed by the lessor was served on the les-

see, who made no election of purchase. Held, that this terminated the lessee's option, and that he could not thereafter maintain a suit for specific performance."

"The terms of the agreement required the notice to be given by Smith, as it was; but, whether given by Smith or Harding, Gibbs knew there was a chance to sell the land, and his plain duty under the agreement was to exercise his option at once within the 10 days, and not let pass the opportunity to make a sale of the land. He could not consistently with any principle of fair and honest dealing, under the contract which he had made, destroy the opportunity of making a sale, wait until the expiration of the year to see if there might not be an increase in value of the land, and then exercise his option to purchase. We conceive, too, that Smith had the right, under the agreement, to give the notice, in order to protect his interest under the agreement. If only the purchaser from him, where there had been a sale, could give the notice, then, on the purchaser's omission to give the notice, Smith might lose the benefit of such sale, as Gibbs could avoid it by the exercise of his option thereafter.

The decree of the superior court will be reversed, and the cause remanded for further proceedings in conformity with this option."

On June 26, 1922, the District Court of Appeals, Third District, California, in the case of Manasse et al. v. Ford et al., 58 California Appeals 312, the Court decided the question in favor of the lessor. In this case lessor found a bona fide purchaser for the sum of $9,500.00, and he thereupon gave to the respondents a written notice required by the terms of said contract.

The respondents failed for more than 30 days to purchase the property and thereafter the lessor sold the prop-

erty to the appellants for the sum of $9,500.00. Notwithstanding the provisions of the proviso, the respondents claimed the right to purchase the property from the appellants. They based their contention upon the following clause:

> " 'The Lessor may sell the same subject to this lease and this lease, the conditions, restrictions and covenants thereof shall then be in full force and effect and binding upon the lessee and the purchaser of the said property.' "

The trial court decided this case in favor of the respondents, but the District Court of Appeals reversed the trial court and in so doing made the following statement:

> "The trial court rendered judgment in favor of the respondents and found, in effect, that they continued after the sale to have the same rights of purchase of the property as though the proviso had never been incorporated in the lease. The court, in so doing, however, disregarded one of the leading statutory canons of interpretation. This is that some effect must be given to each and every provision of a contract, if this can be done without doing violence to the language used by the parties.
>
> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."
>
> "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."
>
> "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."
>
> "Particular clauses of a contract are subordinate to its general intent."

"Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."

"There is no repugnancy in the terms of the contract, but if there were an effort should be made to give some effect to every part of it. Moreover, it must receive such an interpretation as will avoid absurdities and particularly such an interpretation as will not serve to excise any of its provisions."

On February 23, 1923, the Court of Appeals for the State of Kentucky in the case of Adams et al. v. Helburn, 198 Kentucky 546, dealt with this same subject matter and decided the case in favor of the lessor. The lower court decided this case in favor of the lessor, and the Court of Appeals affirmed and in so doing had the following comments to make:

"A lease giving the tenant the option to purchase the leased premises at a stated price, and further providing that, if lessor had an offer for the purchase of the property, he should give the lessee the privilege of purchasing it at the figure offered, gives the lessee the option of buying at the fixed price only if he exercised that option before the lessor received an offer which he desired to accept, after which the lessee had the option of purchasing at the figure offered, whether that might be more or less than the fixed price, so that the lessee could not purchase at the fixed price after he was notified the lessor had an offer of double that price."

"It is the contention of appellants that the contract gave to them an option to buy the property at $25 a front foot a any time during the year 1919, and also an option, as a preferred vendee, to purchase it at less than $25 a front foot, if the lessor, during the year,

received an acceptable offer of less than that amount. Appellee contends that appellants had the right to exercise their option and take the property at $25 a front foot, but if they failed to exercise the option before appellee received a larger offer that he was willing to accept, then upon giving appellants notice of the larger offer their option was limited to taking the property at that price.

(1) The question is one of construction. The language of the two paragraphs is not as clear as it might be, but we construe it to mean that appellant had the option of buying the property at $25 a front foot, but, if they failed to exercise that option before appellee received an offer that he desired to accept, appellants then had the option of purchasing 'at the figure offered', whatever that might be, whether less than $25 a front foot or more than the amount. That was the view of the trial court, and in our judgment it is correct."

On March 22, 1946, the Circuit Court of Appeals for the Fifth Circuit in the case of Shell Oil Company, Inc. v. Blumberg, et al., 154 Federal Reporter 2d 251; the lower court in this case decided the matter in favor of the lessor and the Fifth Circuit Court of Appeals affirmed the lower court's decision and in so doing had the following to say:

"Where first paragraph of lease gave lessee option to purchase leased property for $10,000, and second paragraph gave lessee option to purchase property upon terms offered by prospective purchaser, and last clause provided that lessee's failure to exercise any option should not affect lessee's right in estate created, lessee's right to purchase property for $10,000 terminated with rejection of lessor's offer to sell for amount offered by prospective purchaser and thereafter lessee's rights were under the second paragraph.

Lessee given first privilege of purchasing leased premises must, after notice from lessor of receipt of bona fide offer, elect to exercise lessee's privilege in accordance with terms of lease or the right is lost."

"We think the lower court's construction of the contract was entirely correct. The first paragraph thereof, standing alone, confers upon appellant an option to purchase the premises for $10,000, during the term of the lease, but the second paragraph limits or modifies the preceding paragraph. Upon the notice to appellant by the Bishop of a bona fide prospective sale, and upon its being given the opportunity to exercise its option to purchase the property at the same price offered, and the appellant's refusal to purchase, the first paragraph of the option-agreement lapsed. Thereafter appellant's remaining rights were under the second paragraph. Appellant's right to purchase the leased premises for $10,000 terminated with its writing of the letter dated August 15, 1940, advising the Bishop of its election not to accept his offer to sell the premises.

The provision in the second paragraph above quoted, giving the lessee the privilege of purchasing the property from a subsequent owner on the same terms as such owner might be offered, does not authorize or permit appellant to purchase the leased premises from the present owner for $10,000 if it so elects, but simply gives it the privilege of buying at a price that may be offered the present owner if the present owner desires to sell. The last sentence under paragraph 2 of the lease-contract, above quoted, does not refer to rights under paragraph 1 but only to future options and to the lease estate itself."

On February 17, 1959, in the Appellate Court of Illinois in the case of Northwest Racing Association v. William Hunt and Virginia Daley, Executors of the Last Will and

Testament of George E. Hunt, deceased, 20 Illinois Appeals 2d 393, there was a suit for the construction of a lease with the dual option agreement. The lower court decided this case in favor of the lessor and the Appellate Court of Illinois affirmed. The Court said:

> "Where there were two options to purchase in a lease each susceptible of interpretation as consistent with each other and plaintiff's right in first option was subject to right of lessors to sell to a third party and lessor fixed right of parties by selling under second option, plaintiff having failed to exercise its right under second option lost its right to purchase under either option in the lease by reason of its failure to meet offer of the purchaser under second option.
> When lessee is given the first privilege of purchasing the premises, he must after notice from lessor of the receipt of the bona fide offer elect to exercise his privilege in accordance with the terms of the lease or the right is lost."

The Plaintiff in this cause relied on two points in contending it had a right to purchase said property at the fixed price in the first option and it also contended that the sale to Daley was voidable because Daley was the spouse of one of the coexecutors. The Court, in rejecting the plaintiff's contention, said that neither was tenable. The Court further said:

> "Where lease contained two options to purchase and plaintiff's right in the first option was subject to an equally effective right of the lessors to sell to a third party and lessors fixed the rights of the parties by selling under the second option, sale to the third party was not voidable at the option of plaintiff because it was in fact a sale to a nominee of one of coexecutors of lessor."

On February 12, 1963, the Supreme Court of Iowa in the case of Imperial Refineries Corporation v. Lila Moris-

say, 119 S. W. 2d 872, had the dual option question, but the Supreme Court of Iowa in reversing the lower court held that the lessee, who had both an option to purchase for a mutually satisfactory price not to exceed $22,000.00 and a first refusal option, had waived the first option, and that the lessor, by notifying lessee of receiving a bona fide $45,000.00 offer from a third party, had thereby offered to sell to lessee, under lessee's first refusal option, for $45,000.00, and that the lessee had accepted.

On March 8, 1963, the Supreme Court of Errors of Connecticut in the case of Texaco, Inc. v. Louis B. Rogow, 190 Atlantic Reporter 2d 48, the question of dual option was presented to the Court with the lessee asking for specific performance on the fixed price option, and a counterclaim of the lessor asking for specific performance on the first refusal option. The lower court denied specific performance in each instance, and the Supreme Court of Errors of Connecticut affirmed. This is possibly the latest case dealing with the dual option and seems to clearly set out what the law is in construing this type of contract. In April of 1959, the defendant (lessor) decided to accept an offer which had been made to him by Albert N. Spaien to purchase the leased premises for $44,000.00. The defendant mailed the necessary notice to the plaintiff, setting forth that he desired to accept the offer. The plaintiff claims that it wrote a letter to the defendant dated May 4, 1959, wherein it exercised its fixed price option.

After a formal demand on the defendant for a conveyance at the fixed price option of $16,000.00 which the plaintiff made on May 14, 1959, and a formal tender of the $16,000.00 made on September 3, 1959, both of which were refused by the defendant, the plaintiff, on September 23, 1959, instituted suit. The Court concluded that the plaintiff lost its right to purchase at the fixed price when it failed to exercise its first refusal option

within 30 days after receipt of the notice of April 29, 1959. In denying specific performance to both the lessor and the lessee, the court had the following to say:

> "The plaintiff's interpretation of the provisions in question would, solely by implication, wholly subordinate the first refusal provision of the fixed price option. This interpretation is reached in the absence of any language in the lease expressive of any such intention and would render virtually inoperative the provision expressly according the defendant the unrestricted opportunity to attempt to obtain the fair value of the property during the first nine years. There is no language whatever in the lease indicative of any intention other than that the first refusal provision was the only one under which the plaintiff could purchase the property during the first nine years and that, after that period, the first refusal provision was one of two option provisions, each of which was on a parity with the other. Under the circumstances, it would be unreasonable to hold that, if a lessee is given notice of any offer and refuses to exercise a first refusal option under paragraph 9 (b) it can thereafter, at any time after the first nine years, purchase the property at $16,000.00 despite a prior sale of it to the offeror named in the notice.
>
> A term not expressly included will not be read into a contract unless it arises by necessary implication from the provisions of the instrument. Ives v. Williamantic, 121 Connecticut 408, 411, 185 A. 427; Connecticut Co. v. Division 425 of Amalgamated Ass'n. of Street, etc., 147 Conn. 608, 621, 164 A. 2d 413. Also, if the terms of an instrument are fairly susceptible of two or more interpretations, the one which is the more equitable, reasonable and rational is to be preferred. Peoples v. New England Lumber &

Box Co., 107 Conn. 724, 726, 142 A. 387; Hamden Holding Corporation v. United Men's Shops, Inc., 127 Conn. 500, 502, 18 A. 2d 356. Furthermore, words in an agreement must be accorded their common meaning and usage where they can be sensibly applied to the subject matter of the contract.

The agreement as a whole must be considered, and each part given effect if possible. Sturtevant v. Sturtevant, 146 Conn. 644, 647, 153 A. 2d 828, 79 A. L. R. 2d 604. These rules cannot be rendered ineffective in this case by the general rule that, where there is an ambiguity, the lessee is favored—a rule recognized in such cases such as Connecticut Land & Mortgage Co. v. Lesser, 136 Conn. 580, 583, 72 A. 2d 805, and Ingalls v. Roger Smith Hotels Corporation, 143 Conn. 1, 6, 118 A. 2d 463. This general rule does not mean that any solution of a claimed ambiguity, if proposed by a lessee, should prevail.

Applying, as we must, the foregoing rules of interpretation, it becomes clear that the plaintiff's claims are in violation of them and must fail. It is also clear that the correct application of these rules supports the result reached in the court below. The plaintiff's fixed price option could be effectively exercised only after the first nine years of the term, and then, practically speaking, only prior to the plaintiff's receipt of a notice from the defendant of the Spaien offer and of the defendant's desire to accept it. Thereupon, the fixed price option was rendered ineffective and could not be exercised even after the close of the ninth year, and the plaintiff had to accept the first refusal offer, as provided in the lease, or risk losing the right to purchase the property thereafter. Shell Oil Company v. Blumberg, 154 F. 2d 251, 252 (5th Cir.); Adams v. Helburn, 198 Ky. 546, 548, 249 S. W. 543; 1 Corbin, Contracts

(1950), No. 261, p. 864. It makes no claim that it attempted to exercise the first refusal option. Since the Plaintiff did not, and, as it concedes, could not, exercise its fixed price option during the first nine years of the lease, and since notice giving it the first refusal option was given during that period and indeed, prior to the plaintiff's attempted exercise of the fixed price option, judgment was properly rendered for the defendant on the complaint."

It is called to the Court's attention that in the above cases which have been discussed, it is important to note that the lessor gave notice first to the lessee of its intention to sell to a third party, and thereby, fixed the rights and obligations of the parties to the lease.

The following cases were decided by the Courts in favor of the lessee, but can be easily distinguished from the above cases holding in favor of the lessor.

Butler et al. v. Richardson, 60 Atlantic 2d 718, was decided by the Supreme Court of Rhode Island in August of 1948. The lease in this case was for a period of one year, and while it had a dual option provision, the terms of the lease clearly indicated that the lessee was to have a full year in which to determine whether or not he wanted to purchase the property under the fixed price option of $15,000.00. The lease even provided that if the lessee elected to exercise the fixed price option that the rent payments paid to date would apply against the purchase price. The lessor during the year advised the lessee that a third party was interested in purchasing the premises, but did not inform the lessee of the terms of the offer, and the lessee was not obliged to act on the notice because it was not in compliance with the requirements of the lease. The Court in deciding this case came to the conclusion that the first refusal option in the lease only applied when the third party's offer was less than the fixed price option. The lessee in this case, after re-

ceiving the letter from lessor notifying him of a third party's interest, wrote the lessor's agent, Mrs. Hill, and asked what amount they should send to bind the deal, and Mrs. Hill replied and suggested $500.00. The lessee promptly sent their check for this amount and the Court correctly held that the lessee had, with the consent and approval of the lessor, exercised their fixed price option.

On January 9, 1949, The Supreme Court of Texas in the case of Sinclair Refining Company, et al. v. Allbritton, et al., 218 S. W. 2d 185, had the question of dual option and decided the case in favor of the lessor.

On appeal to the Court of Civil Appeals in Texas, the District Court's opinion was affirmed with Judge Tirey writing a very strong dissenting opinion. The Supreme Court of Texas reversed the District Court and the Civil Court of Appeals and decided the case in favor of the lessee in accord with Judge Tirey's dissenting Opinion in the Court of Civil Appeals.

Your petitioner in this case, Mrs. Prescott, is in complete accord with the Texas Supreme Court's decision and Judge Tirey's Dissenting opinion. In this case, the lessee gave notice to the lessor that it desired to exercise its fixed price option, and when the lessor received this notice, the lessor contended that it had thirty days in which to go out in the open market and try to find a purchaser who would pay more than the fixed price option. The Court correctly held that when the lessee elected to exercise its fixed price option, the rights and duties of the parties were then and there fixed. The Court in this case said further that it was not prepared to follow the Butler v. Richardson case, supra, to the extent of limiting lessor's rights under a purchase refusal article in such circumstances, to third party's sales below the fixed price option.

In the instant case Shell Oil Company had nearly twenty-five years in which to exercise its fixed price

option, and Mrs. Prescott does not dispute Shell's right to exercise its fixed price option if same was done prior to her receiving a bona fide offer from a third party. When you apply the law as set out by the Supreme Court of Texas in the Allbritton case, supra, and the other cases cited by the petitioner, Mrs. Prescott, you must come to the logical conclusion that where dual option provisions are placed in a lease, the party first exercising the option fixes the rights and liabilities of the parties.

On January 4, 1951, the United States District Court, Northern District of Ohio, Eastern Division in the case of Sinclair Refining Company v. Clay, et al., 102 Fed. Supl. 732, had the dual option question and decided same in favor of the lessee. This case differs from the instant case both factually and legally. In that case the lessor had sold this property and presumably the lessee at that time had declined to purchase under the first refusal option. The purchaser from the lessor purchased with actual knowledge that the lessee had a fixed price option and that the lease had some additional time to run. The main distinguishable feature between that case and the case now on appeal is the fact that the lessee gave notice first that it was exercising its fixed price option and the Court correctly held that it had a right to do so.

In the case of Sinclair Refining Co. v. Clay, supra, the Court commented and agreed with the decision in the case of Sinclair Refining Co. v. Allbritton, supra, in that when the purchase option was exercised first, then at that time the rights and obligations were fixed.

On July 28, 1954, the Supreme Court of California in the case of Adams v. Willis, 225 S. C. 518, 83 S. C. 2d 171, in which the question of dual options were involved is a case similar to the Sinclair Refining Company v. Clay, supra, but is entirely distinguishable from the case now on appeal in that the lessee was the one who first exercised its fixed price option.

On March 18, 1966, the petitioner, Mrs. Prescott, received a bona fide offer for the purchase of her property in the amount of $50,000.00. She immediately by registered mail sent the Shell Oil Company a copy of her contract, the names and addresses of the purchasers, and an affidavit from her stating that she was desirous of completing this contract and advised Shell Oil Company that it had twenty-five days in which to decide whether or not it wanted to exercise its right at first refusal.

On April 4, 1966, the Shell Oil Company notified Mrs. Prescott that it did not desire to exercise its first refusal to purchase her property for $50,000.00 but was electing to exercise its option to purchase said property at the fixed price option of $32,500.00. As a result of the letters written by Shell Oil Company to Mrs. Prescott, copies of which were sent to Mr. Van Natta and Mr. Buckingham, and the position taken by the Mid-South Title Company that they could not issue their title policy on this property until such time as the legal questions involved were determined, the prospective purchasers declined to voluntarily go through with their contract to buy said property.

It is the theory of the petitioner, Mrs. Prescott, that when these parties entered into their first lease in 1940, that they both were of the opinion that a fair purchase price for said property was $18,000.00. This was the price that was inserted in the fixed price option, but since this lease was to run for many years, and neither party could foresee the economic future, the right of first refusal was put into the lease to protect both parties. If the property appreciated in value and the lessor had an opportunity to sell the property at a price higher than the fixed price option, the lessee was nevertheless protected, because it had the first right of refusal or the right of purchasing the property at the higher price. However, if during the term of this lease, the economy failed, and the lessor was forced, through economic necessity, to sell the property at a figure much lower than the fixed price option, then the

lessee was nevertheless protected since the lessor would have to give the lessee the first right to purchase at a lower figure. This seems to be a reasonable construction to place upon the lease and give full effect to the entire lease and the intention of the parties. The above reasoning is further borne out by the fact that when the lease expired in 1950, and the parties entered into a new lease; the fixed price option was increased from $18,000.00 to $32,500.00 which should prove conclusively that even the lessee recognized that the property had increased in value. Still neither party could foresee what the economic condition would be in 1966, so they inserted into the lease the first refusal so as to protect both parties as set out above. The lessee, in addition to the above protections had the absolute right to exercise its fixed price option at any time prior to the lessor's receipt of a bone fide offer. In the instant case, the lessee did not elect to exercise its fixed price option until after the lessor had notified the lessee that it had a bona fide offer for the purchase of said property. Then the lessee had the opportunity to purchase the property at the price offered by the bona fide offeror. When the lessee again elected not to purchase the property, surely no court of equity could hold that the lessee could then tell the lessor in effect, "You cannot sell your property, because I have finally decided that I am going to buy it, but not at the price which you have been offered, but at a much lower price." If any court of equity could hold that the lessee had such a right, then surely the court must go further and hold that the paragraph containing the right of first refusal had no meaning whatsoever, and was purely surplusage.

It is the petitioner Mrs. Prescott's position that when she notified Shell Oil Company under paragraph 14 of the bona fide offer of $50,000.00, and of their right of first refusal, that this act fixed the rights of the parties since this act occurred before Shell Oil Company elected to act on the fixed price option in paragraph 13.

The District Court clearly erred in interpreting paragraph "Fourteenth" of the lease so as to limit that option to offers lower than $32,500.00. Clearly paragraph Fourteenth has no such limitation and this limitation should not under the law be read into it.

If this limitation were the intent of the parties, it should have been written in the lease in express terms.

The lease in question was prepared on a Shell Oil Company printed form of lease and should the court find any ambiguity in said lease, it should be construed against the party using said ambiguous language. 51 C. J. S., "Landlord and Tenant," Sec. 232, p. 859.

## RELIEF.

Wherefore, your petitioner respectfully prays that this petition for a writ of certiorari be granted, and that this Court's writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit for the purpose of reviewing the questions hereinbefore specified, and that upon review the judgment and decision of the United States District Court for the Western District of Tennessee, Western Division and the United States Court of Appeals for the Sixth Circuit be reversed, and that your petitioner have such other and further relief as this Honorable Court may deem just.

Respectfully submitted,

LESLIE A. NICHOLSON,

JOHN C. MOORE,
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Attorneys for Petitioner.

# APPENDIX

## APPENDIX A.

### RULING ON MOTION FOR SUMMARY JUDGMENT.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Tennessee,
Western Division.

SHELL OIL COMPANY,
Plaintiff,
vs.
EMOGENE SNYDER PRESCOTT,
Defendant.

Civil Action.
No. C-66-233.

In this cause, on February 3, 1967, before the Honorable Robert M. McRae, Judge, presiding, the Court, after hearing arguments of counsel on motion for summary judgment, announced the following ruling, to-wit:

The Court: As I indicated earlier, the Court has had the benefit of very thorough briefs before the motion was heard orally. The factual situation has been very clearly simplified. The Court has listened to the argument of the attorneys and is willing, if called upon, to more formally reduce the opinion of the Court to writing.

The Court is of the opinion that the judgment should be for the plaintiff, based upon the wording of Paragraph 14 of the lease.

Now, I don't mind saying that this was a surprise to the Court. The first time I read the lease, I thought it was a mutual provision, but when you read the Paragraph 14 carefully it is inescapable in my opinion that you cannot do anything other than limit that option to offers which are lower than the thirty-two thousand five hundred dollar option. I might say that this decision is not

in accordance with my sympathies; but I can't find any overreaching, and we don't decide our cases on sympathy.

I don't see any cause for damages since it has been a relatively short time.

I will say this, that if the case is going to be appealed, then possibly we will have to have some sort of a hearing on damages. I have never granted specific performance before, and I know some title matters have to be reckoned with, although I see somebody has already bought some title work in this case. I would suggest that you gentlemen confer in the light of the Court having cast its lot with the plaintiff and see if there is going to be a problem. If it is going to be more than thirty days or so, the Court would entertain some further application from either side about more specific relief and possibly some measure of damages. The Court would like the attorneys to prepare an order in the case.

Mr. Regan: Thank you, Your Honor.

Mr. Nicholson: Thank you, Your honor.

## APPENDIX B.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Tennessee,
Western Division.

SHELL OIL COMPANY,
Plaintiff,
vs.
EMMOGENE SNYDER PRESCOTT,
Defendant.

No. 66-233.
Civil.

**OPINION—FILED MARCH 23, 1967.**

On February 3, 1967, the Court, by oral opinion, granted a Motion for Summary Judgment for the plaintiff in this suit wherein the plaintiff seeks specific performance for the purchase of real estate pursuant to an option to purchase said property in a lease agreement between the parties. The matter is presently before the Court on the plaintiff's Motion for Supplemental Relief, including an award of damages. The plaintiff asserts that the defendant through her attorney has indicated that the ruling of this Court granting specific performance will be appealed, and the attorney for the defendant confirmed this intention at the hearing of the Motion for Supplemental Relief.

It is the opinion of the Court that the plaintiff in this cause should have a final judgment requiring the defendant to convey to the plaintiff the property in question for the purchase price of $32,500.00, which sum was heretofore paid into court on August 12, 1966. The order should further provide that the Clerk shall deliver the sum heretofore tendered to the attorney for the plaintiff and the

attorney for the defendant for the purpose of depositing the funds under such circumstances as may be agreed upon by the respective attorneys, to the end that the funds shall earn income. The plaintiff, being presently in possession of the premises, shall continue in possession and shall discontinue paying any rent to the defendant. Until the deed is delivered, the defendant shall pay all taxes and insurance and shall be entitled to reimbursement from the plaintiff for all sums paid within thirty days after written evidence of the payment is furnished to the plaintiff. Upon delivery of the deed by the defendant to the plaintiff and upon receipt of the purchase price, the defendant shall also be entitled to the income actually earned upon the amount tendered and subsequently withdrawn.

In the event the defendant shall prevail on appeal, the purchase price and all income therefrom shall be returned to the plaintiff and, the defendant shall reimburse the plaintiff for the total sums paid on taxes and insurance. The amount of rent to which the defendant will be entitled in the event she shall prevail on appeal is reserved for future determination.

The discontinuance of payment of rent is retroactive to February 3, 1967, the date of the decision of the Court. All insurance and taxes shall be prorated between the parties as of that date. All other claims for damages and further supplemental relief by the plaintiff are disallowed.

ROBERT M. McRAE,
United States District Judge.

Enter
3-23-67.

## APPENDIX C.

### FINAL JUDGMENT—FILED APRIL 4, 1967.

This cause came on to be heard upon the Complaint of Shell Oil Company, the Answer of Emmogene Snyder Prescott, the Amendment to Answer, the respective Motions for Summary Judgment filed by each of said parties, the Stipulation entered into by said parties, through their counsel, upon argument of counsel in support of their respective Motions for Summary Judgment, and upon the entire record in the cause.

From all of the above, the Court is of the opinion and does hold that plaintiff, Shell Oil Company, is entitled to specific performance as prayed for in the Complaint, inasmuch as during the term of the subject lease as extended it gave to defendant notice of its exercise of the option to purchase the subject property for the sum of $32,500.00, as provided in Article Thirteenth of the subject lease, which is Exhibit A to the Complaint. The Court holds that under the terms of said lease, plaintiff is entitled to said relief notwithstanding the fact that prior to the time that plaintiff notified defendant of its exercise of its option as aforesaid, defendant notified plaintiff that she had received from other parties a bona fide offer to purchase the subject property for the sum of $50,000.00 and furnished an affidavit that said offer was a bona fide offer, all pursuant to Article Fourteenth of the aforesaid lease.

It Is, Therefore, Ordered, Adjudged and Decreed that defendant, Emmogene Snyder Prescott, convey to plaintiff, Shell Oil Company, the premises which are described in the aforesaid lease with all appurtenances, improvements and equipment, and lessor's fixtures and personal property thereon, for the sum of $32,500.00, pursuant to the terms of the aforesaid lease, which is Exhibit A to the Complaint.

This cause further came on to be heard upon plaintiff's Motion for Supplementary Relief founded upon the prayer contained in the Complaint for "such further and other relief, including an award of damages as the facts will justify." From the Stipulation of the parties filed herein on February 2, 1967, and from statements of counsel made in open Court, it appears that notwithstanding the fact that the subject lease expired according to its terms on April 14, 1966, defendant has continued to pay to plaintiff the monthly rental of $250.00 prescribed in the subject lease. Upon this phase of the matter,

It Is Ordered, Adjudged and Decreed as follows:

The plaintiff, being presently in possession of the premises, shall continue in possession and shall discontinue paying any rent to the defendant. Until the deed is delivered, the defendant shall pay all taxes and insurance and shall be entitled to reimbursement from the plaintiff for all sums paid within thirty days after written evidence of the payment is furnished to the plaintiff. Upon delivery of the deed by the defendant to the plaintiff and upon receipt of the purchase price, the defendant shall also be entitled to the income actually earned upon the amount tendered and subsequently withdrawn by consent and for investment under the joint control of the attorneys for both parties.

In the event the defendant shall prevail on appeal, the purchase price and all actual income therefrom shall be returned to the plaintiff, and the defendant shall reimburse the plaintiff for the total sums paid on taxes and insurance. The amount of rent to which the defendant will be entitled in the event she shall prevail on appeal is reserved for future determination.

The discontinuance of payment of rent is retroactive to February 3, 1967, the date of the decision of the Court.

## APPENDIX D.

### NOTICE OF APPEAL.

All insurance and taxes shall be prorated between the parties as of that date. All other claims for damages and further supplemental relief by the plaintiff are disallowed.

To all of which defendant duly excepts.

This 3 day of April, 1967.

ROBERT M. McRAE, JR.,
United States District Judge.

## APPENDIX E.

No. 17917.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

---

SHELL OIL COMPANY,
Plaintiff-Appellee,
v.
EMMOGENE SNYDER PRESCOTT,
Defendant-Appellant.

On Appeal from United States District Court for the Western District of Tennessee, Western Division.

---

Decided July 23, 1968.

---

Before O'Sullivan and Peck, Circuit Judges, and Cecil, Senior Circuit Judge.

Peck, Circuit Judge. The Shell Oil Company (hereinafter "Shell") sought specific performance of its alleged right to purchase for $32,500 the premises leased by it from appellant, Mrs. Prescott, under a purchase option contained in the lease. The District Court granted Shell's cross motion for summary judgment and this appeal followed.

The material facts in this case were stipulated by the parties and are not in dispute. Appellant was the lessor in a written lease agreement with Shell, the pertinent provisions of which are set forth below:

> "Thirteenth. At any time during the term of this lease or any extension or renewal, Shell shall have the

option to purchase the leased premises, with all appurtenances, improvements and equipment and Lessor's fixtures and personal property thereon, for the sum of Thirty Two Thousand Five Hundred Dollars ($32,500.00) exercisable by notice of Lessor.

"Fourteenth. If at any time during the term of this lease, or any extension or renewal thereof, Lessor receives from a ready, willing and able purchaser a bona fide offer to purchase the leased premises, which Lessor desires to accept, Lessor shall give Shell notice, setting forth the name and address of the prospective purchaser and the price and terms of the proposed sale, accompanied by Lessor's affidavit that such prospective sale is in good faith. Shell shall thereupon, in addition and without prejudice to Shell's rights under Article Thirteenth, have the prior option to purchase said premises and Lessor's improvements, fixtures and personal property thereon from Lessor at said price and terms. If Shell elects to exercise said option, it shall so notify Lessor within twenty-five days after Shell's receipt of the aforesaid notice of Lessor's desire to sell. Shell's right to purchase under this Article shall be a continuing right during this lease, or any extension or renewal, whenever Lessor, or any successor in title, desires to sell said property. Shell's failure to exercise any option under this Article shall in no way affect this lease, Shell's rights under Article Thirteenth, or its right to the estate herein created."

The following events occurred during the term of the lease. On March 18, 1966, appellant notified Shell that she had received a bona fide offer from a third party to purchase the property in suit for $50,000, and gave Shell the right to purchase at that price under the first refusal option contained in Article Fourteen. On April 4, 1966,

Shell notified appellant that it declined to exercise its option under Article Fourteen, but that it did elect to exercise its purchase, or fixed price, option under Article Thirteen to acquire the property for $32,500. When appellant disputed Shell's claim under Article Thirteen, this diversity action was commenced in the United States District Court for the Western District of Tennessee.

The issue presented here is one of construction. It is appellant's position that under the terms of the lease the party first exercising one of the dual options fixes the rights and liabilities of the other party. It is thus contended by appellant that while Shell had the absolute right to exercise its purchase option at any time prior to notification by her of receipt of a bona fide offer from a prospective purchaser which she intended to accept, when she gave such notice, Shell's right to purchase the property for $32,500 pursuant to the purchase option terminated.

It is Shell's contention that in addition to its right to possession of the property under the lease agreement, it had the right to purchase the property for $32,500 at any time within the term of the lease under the fixed price option, as well as the continuing right to buy the subject property pursuant to the first refusal option for an amount which, as a practical matter, would be equal to or less than the purchase option price.

Had the parties to this action desired, it is clear that they could have executed a dual option lease similar to the one under consideration whereunder the lessor had the power to terminate the purchase option at any time before its exercise by notifying the lessee of her intent to accept a bona fide offer and offering the lessee first refusal. See *Corbin, Contracts,* § 261 (1950), and cases cited *infra.* However, the lease in dispute is not susceptible to such construction, which would require the following

language appearing in Article Fourteen to be deemed surplusage and as without effect:

> "Shell shall thereupon, in addition and without prejudice to Shell's rights under Article Thirteen, have the prior option to purchase said premises. . . ."
>
> * * * * * * *
>
> "Shell's failure to exercise any option under this Article shall in no way affect this lease, Shell's rights under Article Thirteen, or its right to the estate herein created."

Under applicable Tennessee law, as elsewhere, courts should, in ascertaining the intent of the parties to a contract, construe the contract as a whole and give effect to every part thereof. See *Edelen Transfer & Storage Co. v. Willis,* 16 Tenn. App. 99, 66 S. W. 2d 214 (1932); *City of Memphis v. Ford Motor Co.,* 304 F. 2d 845 (6th Cir. 1962). A corollary principle is that courts are not at liberty to make new contracts for the parties by adding or deleting provisions. See *McKee v. Continental Ins. Co.,* 191 Tenn. 413, 234 S. W. 2d 830 (1950); *Petty v. Sloan,* 197 Tenn. 630, 277 S. W. 2d 355 (1955).

In holding for Shell on the basis of the language in Article Fourteen, the District Court stated:

> "[W]hen you read Paragraph 14 carefully it is inescapable in my opinion that you cannot do anything other than limit that option to offers which are lower than the thirty-two thousand five hundred dollar option."

This was but another way of stating that Shell's right to exercise the purchase option was continuing and not terminable upon receipt of notice pursuant to the first refusal provision, and that in these circumstances, Shell would not likely pay more than $32,500 for the leased property, nor would a prospective purchaser likely offer more

than $32,500 for the premises with the purchase option outstanding. The District Court's construction finds ample support in the two provisions in question, and the court properly rejected appellant's argument that the parties to the lease could not have intended to "limit" the first refusal option to offers lower than $32,500. In this respect, it has been suggested in cases construing dual option leases somewhat similar to the one here that the first refusal option may be merely a device by which the lessor can induce an acceleration of the lessee's decision to purchase by affording an opportunity to purchase at a price more advantageous than that set forth in the purchase option. See *Butler v. Richardson,* 74 R. I. 344, 60 A. 2d 718 (1948); *Sinclair Refining Co. v. Clay,* 102 F. Supp. 732 (N. D. Ohio 1951), aff'd, 194 F. 2d 532 (1952); cf. *Sinclair Refining Co. v. Allbritton,* 147 Tex. 468, 218 S. W. 2d 185 (1949).

Appellant relies on the following cases involving dual option leases, all of which she contends support her position that lessee's rights under the purchase option terminate once an election is made not to purchase the leased premises when given the opportunity to do so on a first refusal basis. *Harding v. Gibbs,* 125 Ill. 85, 17 N. E. 60 (1888); *Manasse v. Ford,* 58 Cal. App. 312, 208 P. 354 (1922); *Adams v. Helburn,* 198 Ky. 546, 249 S. W. 543 (1923); *Shell Oil Co., Inc. v. Blumberg,* 154 F. 2d 251 (5th Cir. 1946); *Northwest Racing Ass'n v. Hunt,* 20 Ill. App. 2d 393, 156 N. E. 2d 285 (1959); *Texaco, Inc. v. Rogow,* 150 Conn. 401, 190 A. 2d 48 (1963). However, while so-called dual option lease agreements are often generally similar, because of variances in phrasing and circumstances of execution it is not often that a decision construing one contract will be dispositive of a case construing another. The prime and controlling distinction between the above cases and the instant case is found in the language of Article Fourteen preserving to Shell its rights to the pur-

chase option. In all of the above cases, there was either a basis for finding that the purchase option had been limited or qualified by the first refusal option, or nothing to indicate that the purchase option was not limited or qualified by the first refusal provision. That is not the case here. Shell's right under the fixed price option in Article Thirteen was not limited or modified in any manner by the subsequent Article giving to it the right of first refusal. On the contrary, by the specific terms of Article Fourteen, Shell's rights thereunder were "in addition and without prejudice to Shell's rights under Article Thirteen. . . ." Further, the failure to exercise the Article Fourteen option was, according to its explicit language, "in no way [to] affect . . . Shell's rights under Article Thirteen." Accordingly, it is here determined that judgment was properly entered for Shell, and the judgment should be affirmed.

Affirmed.

## APPENDIX F.

### UNITED STATES COURT OF APPEALS
for the Sixth Circuit.

SHELL OIL COMPANY,
Plaintiff-Appellee,
vs.
EMMOGENE SNYDER PRESCOTT,
Defendant-Appellant.
No. 17,917.

Before: O'Sullivan and Peck, Circuit Judges, and Cecil, Senior Circuit Judge.

### JUDGMENT.

Appeal from the United States District Court for the Western District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

A True Copy.

Attest:

.....

Carl W. Reuss,
Clerk.

Issued as Mandate:

Costs: Awarded to Appellee

Filing fee .....$——
Printing appendix .....$148.65

Total .....$148.65

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 653.

EMMOGENE SNYDER PRESCOTT,
Petitioner,

vs.

SHELL OIL COMPANY, INC.,
Respondent.

## BRIEF

**In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.**

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LAUGHLIN, WATSON, GARTHRIGHT & HALLE,
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St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. .....

EMMOGENE SNYDER PRESCOTT,
Petitioner,

vs.

SHELL OIL COMPANY, INC.,
Respondent.

## BRIEF

**In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.**

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The opinion of the Sixth Circuit Court of Appeals affirming the decision of the United States District Court for the Western District of Tennessee, Western Division in favor of Shell Oil Company, plaintiff in the trial court, appellee in the Court of Appeals, and respondent herein, is reported in 398 F. 2d 592 (July 23, 1968).

## JURISDICTION.

Petitioner in this case has prayed that a writ of certiorari issue to review the judgment of the United States District Court for the Western District of Tennessee, Western Division, and has prayed that this Court review and reverse the judgment of that Court and also the judgment of the United States Court of Appeals for the Sixth Circuit. Without waiving any question of jurisdiction with regard to a prayer for issuance of a writ of certiorari to review the decision of a trial court, respondent will reply to the petition viewed as a petition for issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Rule 19 (b), Rules of the Supreme Court of the United States, makes provision for consideration of granting a review on writ of certiorari "Where a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter; . . ." This is the rule relied upon by petitioner, and it is claimed that this rule is applicable because the case of **Shell Oil Co., Inc. v. Blumberg**, 154 F. 2d 251 (5th Cir. 1946), decided the issues in favor of the landowner, whereas the Sixth Circuit in the instant case decided the issues in favor of the tenant oil company.

The **Blumberg** case and the instant case were diversity cases decided by federal courts sitting in different states under different fact situations. More importantly, the contractual provisions in the leases involved in the **Blumberg** case and in the instant case were different in material respects. The different facts taken in conjunction with the different lease provisions formed the basis for different results which were reached by the Fifth Circuit Court of Appeals in the **Blumberg** case and the Sixth Circuit Court of Appeals in the **Prescott** case, which is the instant case.

Respondent respectfully contends that contrary results in separate cases decided under different facts with different lease provisions do not amount to a conflict between decisions of court of appeals on the same matter within the contemplation of Rule 19 (b). The dissimilarity between the **Blumberg** case and the instant case will be noted in the brief which follows. However, it is appropriate to note herewith the observation of the Sixth Circuit on the point, which is contained in the following excerpt from that Court's decision in this case:

> "Appellant relies on the following cases involving dual option leases, all of which she contends support her position that lessee's rights under the purchase opiton terminate once an election is made not to purchase the leased premises when given the opportunity to do so on a first refusal basis. Harding v. Gibbs, 125 Ill. 85, 17 N. E. 60 (1888); Manasse v. Ford, 58 Cal. App. 312, 208 P. 354 (1922); Adams v. Helburn, 198 Ky. 546, 249 S. W. 543 (1923); Shell Oil Co., Inc. v. Blumberg, 154 F. 2d 251 (5th Cir. 1946); Northwest Racing Ass'n v. Hunt, 20 Ill. App. 2d 393, 156 N. E. 2d 285 (1959); Texaco, Inc. v. Rogow, 150 Conn. 401, 190 A. 2d 48 (1963). However, while so-called dual option lease agreements are often generally similar, because of variances in phrasing and circumstances of execution it is not often that a decision construing one contract will be dispositive of a case construing another. The prime and controlling distinction between the above cases and the instant case is found in the language of Article Fourteen preserving to Shell its rights to the purchase option. In all of the above cases, there was either a basis for finding that the purchase option had been limited or qualified by the first refusal option, or nothing to indicate that the purchase option was not limited or qualified by the first refusal provision. That is not the case

here. Shell's right under the fixed price option in Article Thirteen was not limited or modified in any manner by the subsequent Article giving to it the right of first refusal. On the contrary, by the specific terms of Article Fourteen, Shell's rights thereunder were 'in addition and without prejudice to Shell's rights under Article Thirteen. * * *' Further, the failure to exercise the Article Fourteen option was, according to its explicit language, 'in no way [to] affect * * * Shell's rights under Article Thirteen.' Accordingly, it is here determined that judgment was properly entered for Shell, and the judgment should be affirmed.

Affirmed."

## COUNTER-STATEMENT OF FACTS.

Respondent accepts the statement of facts in petitioner's brief, with the additional statement that, subsequent to the filing by Shell Oil Company of its motion for judgment on the pleadings, the parties filed a stipulation of facts; and thereafter on February 3, 1967, Shell Oil Company filed its motion for summary judgment. Thus the cause was heard by the Court on motions of both parties for summary judgment.

## ARGUMENT.

### I.

**Should the Court Construe a Lease as Written, and Refuse to Make a New Contract for the Parties?**

**The District Court and the Court of Appeals Answered This Question "Yes."**

**The Answer Should Have Been "Yes."**

**1. The Court can only construe a lease as written and cannot make a new contract for the parties.**

It is axiomatic that a party is bound by what he signs, and that courts will not remake contracts for parties. In this case the petitioner did not contend that she did not read the contract or understand its terms, nor that it is not an entirely valid contract. However, the effect of her refusal to convey the property pursuant to paragraph 13 amounts to a renunciation of that portion of the contract, presumably influenced by an increase in the value of property generally and this property in particular.

Articles Thirteenth and Fourteenth of the subject lease are set forth herewith for ready reference:

> Thirteenth. At any time during the term of this lease, or any extension or renewal, Shell shall have the option to purchase the leased premises, with all appurtenances, improvements and equipment, and Lessor's fixtures and personal property thereon, for the sum of Thirty-Two Thousand Five Hundred Dollars ($32,500.00), exercisable by notice to Lessor.
>
> Fourteenth. If at any time during the term of this lease, or any extension or renewal thereof, Lessor receives from a ready, willing and able purchaser a bona fide offer to purchase the leased premises, which

Lessor desires to accept, Lessor shall give Shell notice, setting forth the name and address of the prospective purchaser and the price and terms of the proposed sale, accompanied by Lessor's affidavit that such prospective sale is in good faith. Shell shall thereupon, in addition and without prejudice to Shell's rights under Article Thirteen, have the prior option to purchase said premises and Lessor's improvements, fixtures and personal property thereon from Lessor at said price and terms. If Shell elects to exercise said option, it shall so notify Lessor within twenty-five (25) days after Shell's receipt of the aforesaid notice of Lessor's desire to sell. Shell's right to purchase under this Article shall be a continuing right during this lease, or any extension or renewal, whenever Lessor, or any successor in title, desires to sell said property. Shell's failure to exercise any option under this Article shall in no way affect this lease, Shell's rights under Article Thirteenth, or its right to the estate herein created.

It is to be noted that Article Fourteenth provides that Shell's rights under that article are "in addition and without prejudice to Shell's rights under Article Thirteenth," and further that Shell's failure to exercise any option under Article Fourteenth shall in no way affect Shell's rights under Article Thirteenth. Petitioner's contention is that by giving Shell notice under Article Fourteenth of the existence of a bona fide offer from the third party, she thus precluded Shell from exercising its right under Article Thirteenth to purchase the property for the price fixed therein. In order to support this contention, the provisions of Article Fourteenth just referred to would necessarily have to be ignored or deleted from said Article Fourteenth.

With respect to the binding effect of written contracts, the Tennessee Supreme Court in **DeFord v. National Life**

**& Accdt. Ins. Co.**, 182 Tenn. 255, 185 S. W. 2d 617 (1945), stated:

> "The general principle involved was thus stated by a high authority many years ago:
>
> " 'It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.' **Upton v. Tribilcock**, 91 U. S. 45, 50, 23 L. Ed. 203."

Again, it was stated in **Stone v. Martin**, 185 Tenn. 369, 206 S. W. 2d 388 (1947):

> "However, we are fully sensible of our limited function and that we can only construe the lease as written, and not make a new contract for the parties. Gibson's Suits in Chy., sec. 949; **Southern Style Shops v. Mann**, 157 Tenn. 1, 4 S. W. 2d 959."

**2. All clauses of a contract should be construed as in harmony with each other if possible. However, if two clauses of a contract are so repugnant to each other that they cannot stand together, the first will be received, and the latter rejected.**

The principle announced has been stated by the Tennessee Supreme Court in **Bartlett v. Philip-Carey Manufacturing Co.**, 216 Tenn. 323, 392 S. W. 2d 325 (1965), as follows:

> "Counsel for appellee correctly state the legal principle that 'if two clauses of a contract are so repugnant to each other that they cannot stand together,

the first shall be received and the latter rejected.' However, the *sine qua non* of this rule is a repugnancy; we have already noted that there is an absence of repugnancy in the contract before the Court.

"This principle was recognized in the case of **Bank of Commerce & Trust Co. v. Northwestern Life Ins. Co.**, 160 Tenn. 551, 26 S. W. 2d 135, 68 A. L. R. (1930), but the Court there stated that it must construe the contract so that all clauses will be in harmony, if such a construction is possible. It would seem that the construction placed upon the contract by the Chancellor violated this duty, since there is no logical inconsistency in the two paragraphs.

"Bartlett, through counsel, relies on the following language from **Weatherly v. American Agricultural Chemical Co.**, 16 Tenn. App. 613, 65 S. W. 2d 592 (1933):

" 'Where contract involved in suit was drafted by defendant's attorney, language thereof, if ambiguous, must be construed most strongly against the defendant.'

"Again we agree with the principle expressed, but as there is no ambiguity in the contract here before us there is no basis for applying it. Merely because language happens to be technical or complex to the layman does not render it ambiguous.

" 'If there is no ambiguity in the contract, its interpretation becomes a question of law.' **Foote Mineral Co. v. Maryland Cas. Co.**, 173 F. Supp. 925, 931 (E. D. Tenn. 1959). Also see **Aetna Life Ins. Co. of Hartford, Conn. v. Bidwell**, 192 Tenn. 627, 630, 241 S. W. 2d 595 (1951) to the same effect."

In the instant suit, respondent maintains that paragraphs 13 and 14 are not repugnant, in that paragraph

13 gives the lessee a clear option to buy at a fixed price while paragraph 14 in effect gives the lessee a "first refusal" in a case wherein the lessor is proposing to make a sale for a lower price.

Thus, the two paragraphs can stand together and are not repugnant. However, respondent cites the above authority for the proposition that, if said causes should be considered to be repugnant, paragraph 13 would prevail, and this is the paragraph under which respondent exercised its option to purchase the property for $32,500.

In contracting to pay the stipulated rental, respondent purchased three rights:

(1) Tenancy for the term of the lease.

(2) The right to purchase for $32,500 in any event, if exercised during the term.

(3) The right to purchase the property at a lesser price—a first refusal—in the event that the owner receives such an offer from another party, and wishes to make the sale.

Obviously, the tenant would not exercise this last right if the proposed sale price exceeded the option price of $32,500. But paragraph 14 does provide the tenant an opportunity whereby the property can be purchased for less than the option price if the owner proposes to sell it to another for such lesser price. This right is without prejudice to Shell's right under paragraph 13, as is seen from the following sentences excerpted from paragraph 14:

> "Shell shall thereupon, in addition and without prejudice to Shell's rights under Article Thirteenth, have the prior option to purchase said premises and Lessor's improvements, fixtures and personal property thereon from Lessor at said price and terms.
>
> * * * * * * *

"Shell's failure to exercise any option under this Article shall in no way affect this lease, Shell's rights under Article Thirteenth, or its right to the estate herein created."

## II.

**Should the Court Grant Specific Performance of a Written Option to Purchase Real Estate, Which Is Certain, Fair to All Parties, and Capable of Being Performed?**

**The District Court and the Court of Appeals Answered This Question "Yes."**

**The Answer Should Have Been "Yes."**

**1. Traditionally, courts of equity will decree specific performance of a contract for the sale of realty, as against the objection that the complainant should be remitted to an action at law for damages.**

This principle was stated by the Tennessee Supreme Court as early as 1853 in the case of **Blair v. Snodgrass**, 33 Tenn. 1, ... S. W. ... (1853), as follows:

"It is true that, in the absence of any valid objection, it is a matter of course to decree the specific performance of a contract for the sale of real property. It is a higher and more perfect remedy than the damages which a court of law can give for a breach of the contract. 9 Ves. 608; 12 id. 395; 4 Pet. 311, 328.

"As a general rule, 'courts of equity will decree a specific performance where the contract is in writing, and is certain, and is fair in all its parts, and is for an adequate consideration, and is capable of being performed, but not otherwise.' 2 Story's Eq. Jur. 751; **Denton v. Stewart**, 1 Coxe 258; **Cathcart v. Robeson**, 5 Pet. 264."

In the instant case, respondent maintains that this written contract, when reasonably construed, is certain, fair

in all its parts, is for an adequate consideration, and of course is capable of being performed.

The case of **Pence v. Archer**, 191 Tenn. 385, 234 S. W. 2d 820 (1950), was one in which the Court decreed specific performance of a contract to sell realty despite the contention of the owner that the written memorandum relied upon was too indefinite. The parties made an oral agreement for the sale of the subject property, which was followed by a written memorandum signed by the owner, stating in its entirety:

> " 'This is to certify that we, L. G. Archer and wife Estella Archer, hereby agree to give Mr. E. E. Pence to February 1, 1950 on a certain trade agreement or option on a house and lot at 403 West Walnut Street, Johnson City, Tennessee. Agreed price to be ten ($10,000) Dollars at least $8,000 cash on day of sale.
>
> " 'This Dec. 24, 1949.
>
> " 'Signed L. G. Archer,
> Estella Archer.' "

The legal description of the property in fact was: "Lots 1, 2, 3 and 4 and ten feet off the easterly side of Lot 5 of block 16 of the southwest addition of Johnson City, Tennessee . . ."

The purchaser accepted the offer, but the owner declined to convey, and defended the ensuing action for specific performance on the ground that the written memorandum was too vague and indefinite to support the action. The Court, however, held that parol evidence would be admissible to establish the location and boundaries of the tract, and decreed specific performance. The Supreme Court affirmed this action of the Chancellor. In the instant case, of course, there is no such indefiniteness, and there is no need to rely upon parol evidence.

The case of **Gulf Refining Co. v. Belz**, 204 Tenn. 47, 315 S. W. 2d 403 (1958), involved the construction and enforcement of an option provision in a lease executed by Philip Belz and wife in favor of Gulf Refining Company for the operation of a gasoline filling station. The Chancellor decreed specific performance, and the Tennessee Supreme Court affirmed. The Court, in setting forth its views as to the meaning of the option provisions, states:

> "There is, however, one rule which the Court should apply in ascertaining that construction. That rule is that an option to purchase land within a given time should be construed so as to 'extend the time the full limit of which the contract is susceptible, so as to prevent the right granted from being lost'. **Allen v. Effler**, 144 Tenn. 685, 696, 235 S. W. 67, 70. In this connection, it must also be kept in mind that one of the considerations which moved Mr. and Mrs. Belz to give this option was the leasing from them of this property for a term of years by Gulf Refining Company."

The owners contended that certain provisions of the lease indicated that the sale was to be completed "on or before the end of the lease". Thus they argued that the notice should be given a sufficient time prior to the end of the lease for them to prepare an abstract of title, with an additional sixty days provided for the optionee to examine the title, all amounting to approximately ninety days. The notice in that case was given eight days before the expiration of the lease, and it was contended that this was insufficient. The Court disposed of this contention, stating:

> "As this Court views the matter, the option contract is certainly susceptible of being construed to mean that the Gulf Refining Company had up to the expiration of the lease within which to give notice of

its election to purchase. Being susceptible of that construction, it must be given that effect unless we ignore the rule stated in **Allen v. Effler,** *supra*, that an option contract will be so construed as to 'extend the time the full limit of which the contract is susceptible, so as to prevent the right granted from being lost.' "

Finally, it was argued that there was lack of mutuality and that thus the option provision must fail. The Court rejected this contention, stating as follows:

"Appellants insist that even though the option be given the construction placed upon it by the Chancellor, nevertheless, the bilateral agreement resulting from the notice of the exercise of the option is void because it lacks mutuality of remedy. Their position is that the Gulf Refining Company could not be compelled to take the property because it reserved the right to exercise its own individual judgment or whim as to what was desired in the way of building or construction permits', and as to whether the title was 'satisfactory' to it.

"Except in cases involving feelings, taste or sensibilities these to 'the satisfaction' of the purchaser cases have been construed to mean that what would be 'satisfactory to a reasonable man would be sufficient'. **Tennessee & Southeastern Coal Co. v. Schwitzer-Cummins Co.,** 173 Tenn. 524, 533, 131 S. W. 2d 553, 556. See also **Robeson & Weaver v. Ramsey,** 147 Tenn. 25, 32, 246 S. W. 413, and **Ragsdale v. Dyer,** 150 Tenn. 496, 513, 266 S. W. 91.

"By way of illustration, the Gulf Refining Company could not require an unlawful building or construction permit and then avoid this agreement on the ground that it could not procure the desired permit. Its demand must be reasonable.

"The same reason applies as to the ability to avoid the agreement on the ground that the title 'is unsatisfactory' to the Gulf Refining Company. Its dissatisfaction must be on natural grounds. . . ."

**Brister v. Brubaker's Estate,** 47 Tenn. App. 150, 336 S. W. 2d 326 (1960), was an action by a purchaser against the administrators and heirs of a deceased landowner for specific performance of a contract for sale of a lot. The Chancellor dismissed the action. The Court of Appeals reversed, holding the Chancellor abused his discretion, and the Supreme Court denied certiorari. The evidence of the contract was a check for $200 drawn by complainant on the Union Planters National Bank, payable to and endorsed by C. B. Brubaker, who died before the action was brought. On the face of the check appeared this notation:

" 'Deposit on Lot 58 by 135 located east side of Highway 61 S. 216 feet north of Eastman Road, Shelby County, Tenn. Bal. $65.00 per front ft. due $35.00 per month after $500.00 is paid at closing. Title guaranteed.' "

The Court of Appeals held this writing to be sufficiently clear, and then added:

"Another contention, which is urged in behalf of the defendants in the instant case, is that specific performance is not a matter of absolute right, but is a matter addressed to the sound legal discretion of the court; for which proposition counsel for defendants cite **Morrison v. Searight,** 62 Tenn. 476, 481; **Northcutt v. Massie,** 201 Tenn. 638, 301 S. W. 2d 355, 357; **Parsons v. Hall,** 185 Tenn. 363, 199 S. W. 2d 99; **Johnson v. Browder,** 185 Tenn. 601, 207 S. W. 2d 1, and Gibson's Suits in Chancery (5th Ed.), Section 995. It is contended, of course, that the Chancellor did not abuse his discretion in the instant case.

"On the other hand, counsel for complainant contends that, ordinarily, Equity will decree specific performance of a contract for sale of land, as a matter of course, in the absence of any valid objection, where the contract is valid; and for this proposition they cite: Pomeroy's Equity Jurisprudence, 5th Ed., Vol. 4, p. 1034; **Blair v. Snodgrass,** 33 Tenn. 1; **Radiophone Broadcasting Station v. Imboden,** 185 Tenn. 215, 191 S. W. 2d 535, and **Richardson v. Bristol Land and Improvement Co.,** 1 Tenn. App. 671.

"As applied to the facts of the instant case, we adopt the view of the complainant, rather than that of the defendants; and we hold that the learned Chancellor abused his discretion by refusing a decree of specific performance."

2. **Increase in value of land is not a sufficient ground for denying specific performance of contract for its sale.**

The case of **Brister v. Brubaker's Estate,** 47 Tenn. App. 150, 336 S. W. 2d 326 (1960), is discussed above. In addition to the rulings set forth above, the Court also stated certain facts relating to increase in value, and its conclusion in connection therewith as follows:

"As to terms of payment, the contract is equally clear. It provides that $65 per front foot shall be paid at the rate of $35 per month after $500 is paid at closing. Sixty-five dollars per front foot for the 58 feet fronting on Highway 61 S. totals $3,770, which added to the $200 represented by the check itself, and $500 additional to be paid at closing, makes the total price of the lot $4,470. This figures to be a little more than $77 per front foot, which is certainly not a grossly inadequate consideration. The Chancellor's opinion says, 'That the fair market value of the land in question was $75.00 per front foot in 1955, and it is worth $175.00 per front foot at the present time.'

"Change in value is not sufficient ground for denying specific performance. **University of Tennessee v. Memphis Hospital College Building Company,** 6 Tenn. App. 131; **Smith's Heirs v. Christmas,** 15 Tenn. 565; **Rogers v. Roop,** 19 Tenn. App. 579, 92 S. W. 2d 423; 49 Am. Jur., Specific Performance, Sec. 64, p. 78."

The cases cited in the excerpt just above have been examined, and are authority for the proposition stated herewith. However, they will not be further discussed here for the reason that the principle involved is so clearly stated in the case of **Brister v. Brubaker's Estate,** supra.

3. **Cases construing dual option provisions analyzed.**

The case of **Sinclair Refining Co. v. Clay, et al.,** 102 F. Supp. 732, **aff'd,** 6th Cir., 194 F. 2d 532 (1952), is very apposite to the present case, and the decision approved therein by the Sixth Circuit can well be applied to the facts of this case. In the **Clay** case, one Robertson leased certain property to Sinclair Refining Company. The lease **prepared by Sinclair,** contained a purchase option in Article XIV and a first refusal option in Article XV. The latter Article specified that the lessor should give the lessee notice of an offer to purchase made by another party, and that the lessee had a first refusal to purchase at the price offered, to be exercised within ten days. It was then provided:

"In the event Lessee shall not give Lessor notice, within said ten-day period, of its election to purchase for the amount specified in said offer, Lessee shall not be obligated to purchase, and Lessor may thereafter sell said premises to the party making the offer; subject, however, to this lease and to the leasehold estate herein granted, and to the extension and/or additional purchase options, if any, herein granted to Lessee. If for any reason said premises are not sold

to such party, notice of any subsequent bona fide offers acceptable to Lessor, shall be given to Lessee upon the same terms and conditions for acceptance or rejection as hereinabove provided."

It is to be noted that the quoted language preserving the lessee's rights in its purchase option by making a sale to another party—after lessee's failure to exercise its first refusal—subject to lessee's leasehold estate and "additional purchase options, if any," is by no means as clear and strong as is the language in the case under consideration.

In the **Clay** case, the lessor, Robertson, sold the property to Mrs. Clay, presumably after giving notice to Sinclair. Five years later, Sinclair notified Mrs. Clay that it exercised its option to purchase for $8,500. A few days thereafter, Mrs. Clay secured an offer for $18,500, and offered Sinclair first refusal at that price. Mrs. Clay defended a specific performance action on the grounds that Sinclair lost its purchase option when it refused to purchase from Robertson. The Court awarded specific performance, holding Mrs. Clay, purchaser from the lessor, bound by the terms of the lease, stating:

"Purchase option agreements in leases are not separate and distinct offers which can be withdrawn before acceptance. The giving and acceptance of an option to buy is enforceable and the landlord does not have the right to refuse to carry out his agreement after the lessee exercises his option in accordance with the terms of the lease. Furthermore, such option is a covenant which runs with the land and a grantee of the lessor is bound by the terms of the covenant. Thompson on Real Property, Secs. 1325-1330. This seems to be the general law on this subject, and indeed the parties to the lease intended that any grantee should take the property subject to Sinclair's purchase

option (Article 15). Mrs. Clay admittedly knew of the terms of the lease and she accepted such terms in writing (Plaintiff's Exhibit 5). No other conclusion can be reached than that the purchase option was a continuing obligation which Mrs. Clay must honor."

* * * * * * * *

"Here, of course, we are dealing with Sinclair's purchase option, and not its first refusal option. These two options are separate and distinct. It well may be that failure to exercise a first refusal option after proper notice extinguishes such option, and the language of Article XV could be so construed; but loss of this option still leaves the purchase option upon which Sinclair bases its action."

**(102 F. Supp. at p. 734.)**

If a purchaser from the lessor is held bound to recognize a purchase option—notwithstanding intervening failure to exercise a first refusal option—it would appear, a fortiori, that the lessor is bound.

Petitioner relies upon the case of **Shell Oil Co., Inc. v. Blumberg,** 154 F. 2d 251 (5th Cir. 1946), in support of her position that once she gave Shell notice of a bona fide offer, it could no longer rely upon its option to buy for the price stipulated in the lease. Rather than undertake to distinguish the **Blumberg** case independently, it appears proper to quote from the **Clay** case discussed above:

"In the **Blumberg** case (154 F. 2d 252) it was held that a failure to exercise a first refusal option extinguished both the first refusal option, and the purchase option. But in that case, and correctly so, the court held that the first refusal option modified the purchase option, and the language in the lease to which the court must have been referring is as follows: 'In the event of a sale to any third party by the Lessor, and in the event such purchaser should there-

after desire to sell said property Lessee shall have the like option to purchase at the price offered by any bona fide prospective purchaser * * *; it being understood that this right of the Lessee to purchase at the offered price shall be a continuing right during the existence of this lease whenever * * * any subsequent owner * * * may desire to sell'.

"This section by expressly providing that the first refusal option was a continuing obligation impliedly indicates that the original parties intended that the purchase option would continue only so long as the original lessor held the fee. It seems to me that the court there was relying on this language in holding that the purchase option was extinguished, and was not announcing a general principle of law to govern purchase options regardless of the language used in that lease by the parties. In the lease here in question the parties agreed as follows: '* * * and Lessor may thereafter sell said premises to the party making the offer; subject, however, to this lease and to the leasehold estate herein granted, and to the extension and/or additional purchase options, if any, herein granted to Lessee.'

"Contrary to the **Blumberg** case, the parties here expressly agreed that the purchase option was to continue in the event of a sale to a third party, and this intent must be carried out by the court, even if it does mean that the first refusal option becomes only a device by which lessor could induce an acceleration of Sinclair's decision to purchase by affording it an opportunity to purchase at a price more advantageous to it than the price fixed in the option. **Butler v. Richardson,** 74 R. I. 344, 60 A. 2d 718.

**(102 F. Supp. at pp. 734, 735.)**

The **Clay** case, discussed above, was followed by the Supreme Court of South Carolina in **Adams v. Willis,** 225

S. C. 518, 83 S. E. 2d 171 (1954), an action for specific performance. In this case, Sinclair Oil Company took a lease on certain property, which it thereafter assigned to Adams. The original owner-lessor sold the property to another party, after giving notice to Sinclair, which declined to exercise a first refusal option. Thereafter, the property was sold to Willis. Adams later sought to exercise the fixed price option contained in the original lease, granting Sinclair the right to purchase the premises for $7,000. Willis, owner of the property, refused, contending that Sinclair's failure to exercise its rights under its first refusal option terminated its rights under its purchase option, and this action resulted. The opinion does not set forth the text of options verbatim, but they are described by the Court as follows:

> "In addition to the 'purchase option' in the lease there is another clause known as the 'purchase refusal', and one of the exceptions relates to it. In that clause it is set forth that in the event the lessor shall receive from a third person a bona fide offer to purchase the premises at a specified price, and if the lessor shall decide to sell for that amount, he shall notify the lessee, who shall have the refusal or option of buying the premises at such price, and if the lessee does not elect within ten days to purchase, the lessor may go ahead and sell to the third person, subject to the lease 'and to the extension and/or additional purchase options, if any, herein granted to the lessee.'"

The Court then takes note of the fact that Sinclair declined to purchase the property at the time of the first sale which was made after execution of the lease, and of the second purchaser's defense that this refusal terminated all rights under the purchase option. On this point the Court stated:

"The purchase refusal clause here is quite different from that in the case of **Shell Oil Co. v. Blumberg,** 5 Cir., 154 F. 2d 251, upon which appellant mainly relies. The clause before us is precisely the same, except as to the amount, as that set forth in **Sinclair Refining Co. v. Clay,** D. C., 102 F. Supp. 732, 735, affirmed by the Circuit Court of Appeals in 6 Cir., 194 F. 2d 532. In that case the Court said: 'Contrary to the **Blumberg** case, the parties here expressly agreed that the purchase option was to continue in the event of a sale to a third party, and this intent must be carried out by the court.'

"It will be observed that the present lease provides that any sale shall be subject to the purchase option, wherein the lessee had the right, at any time during the term of the lease, to buy the property for $7,000. The rights of the lessee under the purchase option are continuing, and were not extinguished by its refusal to buy in 1943."

The Court then took up the question which arose from refusal of the trial judge to admit testimony that the property was worth $18,000 at the time of attempted exercise of the option to purchase same for $7,000. The principle governing this situation was stated as follows:

"However, with the evidence in, and duly considered, specific performance should nevertheless be granted, since it is well settled that a mere change in the value of land will not justify a refusal to grant such relief. **Holly Hill Lumber Co. v. McCoy,** 201 S. C. 427, 23 S. E. 2d 372, 373, 380."

Finally, it was argued that the trial court should have denied specific performance, in the exercise of discretion. A similar argument is made in the present case, in which petitioner points out that the price fixed for a purchase option in a 1940 lease was $18,000, and that this price

was increased to $32,500 in the 1950 lease. From this it is sought to be deduced, in some manner, that if lessor gave lessee notice of a bona fide offer in excess of $32,500, then lessee's rights under its fixed price option would be eradicated and deleted from the lease, because of enhancement in value of the property.

As the opinion of the Court in **Adams v. Willis**, above, so appropriately disposes of this argument, a somewhat lengthy excerpt from the opinion in that case is set forth herewith:

> "We can readily understand how it is that the appellant does not like to see Adams come, during the last days of the option, and upon a small consideration reap the benefit of the increase in the value of the lot. However, it cannot be overlooked that people make their own contracts; they have a right to grant fifteen year options if they so desire; and the holder of an option may exercise it at any time while it is in force, even on the last day; the Sinclair company could have exercised the option in May of 1952; the contract gave it the right to assign the option; and the assignment to Adams did not place the appellant in any worse position than he was in before.
>
> "There is not the slightest contention of unfair dealings when the contract was made in 1937. It appears that at that time $7,000 was a full price for the land. Even as late as 1943 Mr. Holleman sold it for that amount. We must look to the situation as it existed when the contract was made, not as it may have been in 1952.
>
> "In **Holly Hill Lumber Co. v. McCoy**, above, it was said: 'The question of adequacy of price must be considered as of the date of the contract, and the subsequent enhancement in value would not justify refusal of specific performance.' **Shannon v. Freeman**, 117 S. C. 480, 109 S. E. 406.

> "The discretion to grant or refuse specific performance is not an arbitrary or capricious one, but a judicial discretion, to be exercised in accordance with the special rules and practices of equity, and with regard to the facts and circumstances of the particular case."
>
> **(83 S. E. 2d at p. 175).**

**Butler v. Richardson,** 74 R. I. 344, 60 A. 2d 718 (1948), was likewise a specific performance action in which the Court upheld the lessee's right to exercise a purchase option, notwithstanding the lessor's notice of an outstanding offer and the lessee's refusal to meet same under a first refusal provision. The lease in that case provided:

> "It is mutually agreed that, at any time while the Lessees are the occupants of the premises herein leased, as Lessees under this lease or any extension thereof or renewal thereof, or as tenants from month to month or otherwise, the Lessors will give them an option to buy at a price of $15,000. Or if the Lessors shall have any offer for the purchase of said premises, which the Lessors are willing to accept, the Lessors prior to accepting same, give the Lessees an opportunity to purchase the said premises on the same terms, by notifying the Lessees in writing of such offer and giving the Lessees 10 days thereafter in which the Lessees shall decide if they will purchase said premises on the same terms."

With regard to the purchase option, the Rhode Island Supreme Court held: "That agreement is complete and not coupled with or conditioned upon any other agreement." As to the first refusal option, it commented: "It is disjointed therefrom, and in no way forms a part or a condition precedent to the option provision." The Court then continued:

> "But the question here is what effect this provision for a first refusal has, if any, upon the provision for

an option. As we indicated above, it has no effect whatever. The right of option remains unimpaired. Until the time prescribed for its exercise expires, the respondents cannot sell for any amount without complainants' consent. However, the provision for a first refusal may nevertheless serve a useful purpose. It provides a means whereby respondents, if they desired, could induce an acceleration of complainants' decision to purchase by affording them an opportunity to purchase at a price fixed in the option. Of course the provision could not serve this purpose if the offer was at a higher price, and consequently it is inconceivable that the parties in agreeing to the provision could have contemplated any offer except one that was lower than $15,000. We are of the opinion, therefore, that the provision for a first refusal should be construed in that light, not so much as an alternative to the provision for an option but rather as a supplement thereto."

The cases relied upon by petitioner have all been examined, and, in the opinion of respondent, fail to support the position for which they are advanced.

**Shell Oil Company v. Blumberg**, supra, is viewed as petitioner's closest case, but the language of the lease involved therein specifically provided that the second option was a continuing one, without making such provision with regard to the first option—the fixed price option. Thus the Court in **Sinclair Refining Company v. Clay**, supra, distinguished the case and refused to follow it in a case in which the language of the lease insuring to the lessee its purchase option rights—apart from questions arising under the first refusal option—was less clear and positive than in the present case.

In all of the cases relied upon by petitioner, the first option is qualified and limited by the second option, either explicitly or implicitly, except for one case which is de-

cided upon facts constituting waiver and election, rather than upon construction of the contract.

For example, in **Harding v. Gibbs**, 125 Ill. 85, 17 N. E. 60 (1888), the Court describes the terms of the fixed option and then recites: "But if the lessor should have an offer for the property, 10 days' notice thereof was to be given to the lessee, and he was to have the privilege of buying at said offer." The Court held the first option was not absolute, but was qualified by the second provision—a result which follows from the language employed.

In **Manasse v. Ford**, 58 Cal. App. 312, 208 P. 354 (1922), the first option was qualified by the second option which was connected thereto by the words "Provided however." **Adams v. Helburn**, 198 Ky. 546, 249 S. W. 543 (1923), did not involve language specifically limiting the first option by the second. But neither did it involve language by which the first option is specifically held inviolate notwithstanding failure to act under the second option—as in the case on appeal.

**Imperial Refineries Corporation v. Morrissey**, 254 Iowa 934, 119 N. W. 2d 872 (1963), merely held as a fact determination that the lessee had waived any rights under the first option and had exercised the second option. **Texaco, Inc. v. Rogow**, 150 Conn. 401, 190 A. 2d 48 (1963), dealt with a dual option provision in a lease whereunder the lessee could exercise the fixed price option only after the first nine years of the lease. The Court concluded that the parties did not intend that the lessee should be precluded from exercising the purchase option for nine years and yet be permitted to exercise it thereafter, notwithstanding notice during the nine year period that lessor had a willing purchaser and that lessee might meet the offer under the first refusal option in the lease. The circumstances of that case differ so widely from those of the present case as to render it hardly analogous, or relevant to the present inquiry.

**4. Final analysis.**

When finally analyzed, the position of the parties appears to be thus:

a). Shell Oil Company relies upon the clear language of Article Fourteenth stating that its right to purchase the subject property for the sum of $32,500, pursuant to Article Thirteenth, is not prejudiced by any action taken under Article Fourteenth, or by Shell's failure to exercise any option under Article Fourteenth. The cases cited in support of this position have preserved lessees' option rights—even against subsequent purchasers—in cases where the language of the leases was by no means as clear and emphatic in preserving such rights as is the language in the instant case.

b). Petitioner, Mrs. Prescott, contends that when she gave Shell notice of a bona fide offer from a third party, she thus precluded Shell from exercising its fixed price option while she owned the property—although she admits the same option could be exercised against a subsequent purchaser, if exercised prior to the time said purchaser gave Shell notice of an offer under Article Fourteenth. The cases relied upon for extinguishment of the fixed price option do not deal with leases wherein this first option is preserved notwithstanding any action or inaction under the second option—the first refusal option.

c). Petitioner suggests in argument that it would be unfair to permit respondent to exercise its option to purchase for $32,500 when she has an offer for $50,000. This ignores the fact that respondent purchased this very right, and has been paying for same in the form of monthly rental throughout many years. Any argument that this is a unilateral contract and in some manner inequitable fails to recognize the fact that many options are paid for and not exercised, and that when an option is exercised, this is in a situation where the optionee deems it prudent to exercise the right for which payment has been made.

d). Petitioner's argument ignores the inclusion of the following language in Article Fourteenth:

> "Shell shall thereupon, in addition and without prejudice to Shell's rights under Article Thirteenth, have the prior option to purchase said premises and Lessor's improvements, fixtures and personal property thereon from Lessor at said price and terms.
>
> • • • • • • •
>
> "Shell's failure to exercise any option under this Article shall in no way affect this lease, Shell's rights under Article Thirteenth, or its right to the estate herein created."

For petitioner to prevail, this language must be ignored or deleted from the lease. No reason for such an approach has been advanced.

## CONCLUSION.

Respondent, Shell Oil Company, respectfully submits that the decision of the United States Court of Appeals for the Sixth Circuit in affirming the action of the District Court granting summary judgment in its favor was correct in all respects, and prays that the petition for certiorari filed herein be denied.

Respectfully submitted,

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